

AUG 10 2006Baylis v. County of Riverside, Nos. 04-55580 and 04-55706**CATHY A. CATTERSON, CLERK**
U.S. COURT OF APPEALS

Judge Leavy, concurring in part and dissenting in part:

I agree with the majority, with the exception of the reversal of the district court's granting of judgment as a matter of law against Perez and Wisznia.

I agree that Baylis's testimony before the grand jury in 2000 touched on matters of public concern. Viewing the evidence in the light most favorable to Baylis, the evidence supports the jury's verdict that Baylis was retaliated against in violation of the First Amendment.

The statements and actions of Perez and Wisznia in support of Baylis, however, did not involve matters of public concern. Their criticisms involved only the length and quality of a 1999 internal personnel investigation of Baylis. Their statements and support for Baylis did not concern possible race discrimination or other matters of significant government misconduct or illegality. Therefore, the jury verdict in their § 1983 claim for First Amendment retaliation is unsupported by the evidence.

A 1999 internal investigation of Baylis was initiated for the purpose of examining Baylis' office conduct and his overall management ability. Perez and Wisznia, in support of Baylis, complained that the investigators were personally biased, were acting in collusion with the Mental Health Administration, were taking longer than necessary, and were fraternizing with the employees being

investigated. Perez and Wisznia believed that these factors affected employee morale and impacted the veracity of the investigation. Their statements never mentioned Baylis' grand jury testimony or any issue of possible racial discrimination, racial bias, or illegal activity by their employer.

The majority's reliance on Alpha Energy Savers, Inc. v. Hansen, 381 F.3d 917 (9th Cir. 2004) and Thomas v. City of Beaverton, 379 F.3d 802, 809 (2004) is misplaced. In Alpha Energy Savers we stated:

A public employee's testimony addresses a matter of public concern if it contributes in some way to the resolution of a judicial or administrative proceeding *in which discrimination or other significant government misconduct is at issue* - even if the speech itself would not otherwise meet the Connick test were we to consider it in isolation.

...

Specifically, if a witness's testimony directly addresses *governmental corruption or discrimination*, it can satisfy the public concern test, even if it is offered in the course of a judicial or administrative proceeding that involves only purely private grievances of issues.

Alpha Energy Savers, 381 F.3d at 928 (emphasis added).

In Alpha Energy Savers, the plaintiff made statements in support of another person who had alleged racial and age bias in the awarding of county contracts, and the evidence demonstrated that the plaintiff was motivated in part by a desire to expose favoritism and fraud in the county's awarding of the contracts.

Similarly, in Thomas, we stated that although an employee need not expressly

accuse her employer of illegal activity, “she may convey an implicit message of disapproval of the *illegality of the activity* [racial discrimination against another employee] through her conduct by refusing to facilitate or participate in it.”

Thomas, 379 F.3d at 809 (emphasis added).

The 1999 investigation of Baylis involved an internal personnel matter regarding Baylis’ management of the division, and did not involve issues of racial discrimination or other illegal conduct. In Perez’ and Wisznia’s joint trial with Baylis, the jury specifically rejected Baylis’ claim of racial retaliation and racial harassment by answering “NO” to the following questions:

- Was race a motivating factor in County’s decision to transfer Robert Baylis at a reduction in pay?
- Was race a motivating factor of the Defendant’s harassment?

Additionally, Perez’ and Wisznia’s opinions that the Baylis investigation was taking longer than necessary do not constitute statements concerning government corruption or illegality. Also, their opinions that the investigators were personally biased and improperly fraternizing with the employees do not constitute statements of illegal activity or significant government misconduct. Cf. Skaarup v. City of North Las Vegas, 320 F.3d 1040, 1044 (9th Cir. 2003) (“At best, Skaarp was taking sides . . . in a dispute. . . The public interest in bureaucratic infighting is also

small.”).

Because both the Baylis investigation and Perez’ and Wisznia’s statements in support of Baylis did not concern possible race discrimination or other significant government illegality or misconduct, Perez’ and Wisznia’s speech did not involve matters of public concern. I therefore would affirm the district court’s granting judgment as a matter of law against Perez and Wisznia.